

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

TRANSCRIPT OF PROCEEDINGS

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:
THE CITY OF HUNTINGTON, : CIVIL ACTION
:
Plaintiff, : NO. 3:17-cv-01362
:
vs. :
:
AMERISOURCEBERGEN DRUG :
CORPORATION, et al., :
:
Defendants. :
:
-----X
:
CABELL COUNTY COMMISSION, : CIVIL ACTION
:
Plaintiff, : NO. 3:17-cv-01665
:
vs. :
:
AMERISOURCEBERGEN DRUG :
CORPORATION, et al., :
:
Defendants. :
:
-----X

PRE-TRIAL CONFERENCE

BEFORE THE HONORABLE DAVID A. FABER
SENIOR UNITED STATES DISTRICT JUDGE

April 29, 2021

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Court Reporter: Lisa A. Cook, RPR-RMR-CRR-FCRR

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produced by computer.

P R O C E E D I N G S

THE COURT: It's certainly nice to see a courtroom full of people.

This is the final pre-trial conference in the *City of Huntington and Cabell County* against *AmerisourceBergen Corporation and others*.

I'll ask the attorneys to note their appearances, please.

MR. FARRELL: Paul Farrell, Jr., on behalf of plaintiffs.

MS. KEARSE: Anne Kearse on behalf of the plaintiffs, Your Honor.

MR. MAJESTRO: Anthony Majestro on behalf of the plaintiffs.

MR. ACKERMAN: David Ackerman for the plaintiffs.

MR. FULLER: Mike Fuller on behalf of the plaintiffs.

MR. MOUGEY: Peter Mougey on behalf of the plaintiffs.

MS. MAINIGI: Enu Mainigi on behalf of Cardinal Health, Your Honor.

MR. RUBY: Steve Ruby for Cardinal Health, Your Honor.

MS. WICHT: Jennifer Wicht for Cardinal Health.

MS. HARDIN: Ashley Hardin for Cardinal Health.

1 MR. HESTER: Timothy Hester on behalf of McKesson
2 Corporation.

3 MR. SCHMIDT: Good morning, Your Honor. Paul
4 Schmidt for McKesson.

5 MS. FLAHIVE WU: Good morning. Laura Flahive Wu
6 for McKesson.

7 MR. STANNER: Andrew Stanner for McKesson.

8 MR. EPPICH: Chris Eppich for McKesson.

9 MR. NICHOLAS: Bob Nicholas for AmerisourceBergen.

10 MS. MCCLURE: Shannon McClure for
11 AmerisourceBergen.

12 MS. CALLAS: Gretchen Callas for
13 AmerisourceBergen.

14 MR. MAHADY: Joe Mahady for AmerisourceBergen.

15 THE COURT: Thank you.

16 This is the final pre-trial conference. We're going to
17 start the trial on Monday at 9:30 with opening statements,
18 allowing three hours a side. After Monday I'd like to start
19 at 9:00 and do a 9:00 to 12:00 and 2:00 to 5:00 schedule
20 with a break in the morning and a break in the evening.

21 The plaintiffs, as I understand, will have two -- well,
22 there are two plaintiffs, so they'll have two people
23 arguing. So that makes it easy to break halfway through the
24 plaintiffs' opening. It's going to be more difficult for
25 the defendants since there are three.

1 So the normal thing to do would be break at the
2 one-and-a-half-hour period, but that's going to hit right in
3 the middle of one of the, one of the opening statements. So
4 if the lawyers are uncomfortable with that, you can decide
5 what you want to do and let me know and we'll take the break
6 where it best fits with, with your plans.

7 I have the proposed Pre-Trial Order. Are there any
8 changes to it? Hopefully the answer is "no." I hesitate to
9 ask.

10 MR. FARRELL: No, Your Honor.

11 MS. MAINIGI: We don't think so, Your Honor. I
12 think a lot of the motions are, are decided at this point.

13 MR. MAJESTRO: Your Honor, I think we've
14 supplemented exhibit lists. The Pre-Trial Order with the
15 attachments, the exhibit lists, were supplemented by both
16 sides on Monday.

17 THE COURT: All right. We've had at least one
18 request for a limited appearance by an attorney who's
19 representing a witness in the case. And I understand that
20 there's been no objection to the motion and I'm going to
21 grant it.

22 I think that involves the Government witness Joseph
23 Rannazzisi. There's no need to -- if that situation comes
24 up with regard to other witnesses, there's no need to file a
25 motion. Unless there is an objection, I'm going to allow a

1 witness who has counsel to appear with one lawyer in tow.

2 We have endeavored to go over all pending motions, even
3 though we haven't completed our opinions. We've filed some
4 of the orders. We expect to rule on all of the rest of the
5 pending motions today except the recently filed motion to
6 exclude the testimony of Dr. Gupta and we're waiting for a
7 response to that motion before we can consider it.

8 So hopefully you'll know where you stand with regard to
9 all of the pending motions before you make the openings on
10 Monday.

11 MS. MAINIGI: Your Honor?

12 THE COURT: Yes.

13 MS. MAINIGI: Enu Mainigi for Cardinal.

14 THE COURT: I'm going to ask you to remove your
15 mask. It will make it easier for me to understand you, Ms.
16 Mainigi.

17 MS. MAINIGI: Absolutely, Your Honor. We're fine
18 with that.

19 Dr. Gupta, as we understand it, may testify as early as
20 Wednesday. And, so, we were hoping we could work out some
21 sort of briefing schedule so that Your Honor has enough time
22 to rule on that motion as you see fit prior to that time.

23 It's, it's our view that given the scope of the
24 exclusion we are seeking for Dr. Gupta that it would be good
25 for both sides to know that before we put him up on the

1 stand.

2 THE COURT: Let me ask the plaintiffs, can you
3 respond to that motion right way? Do you want to respond to
4 it in writing?

5 MR. MAJESTRO: Yes, Your Honor. I have a response
6 in the works that I think we can get to the other side and
7 the Court Sunday. I don't think anybody's taking the
8 weekend off.

9 THE COURT: That will take care of it, won't it?

10 MS. MAINIGI: That's fine, Your Honor. And if
11 Your Honor wants argument, we could figure out a time on
12 that.

13 THE COURT: Well, let me look at the motions and
14 the response and hopefully -- well, if we need argument,
15 we'll just have to take the time to do it.

16 MS. MAINIGI: That's fine, Your Honor.

17 MR. SCHMIDT: Your Honor, may I raise -- Paul
18 Schmidt from McKesson. May I raise a similar issue?

19 We have a witness of ours where there's going to be
20 video played next week, Nate Hartle. Right now, the
21 schedule -- we have the plaintiffs' designations and we know
22 what we're going to object to and they're pretty basic;
23 scope of a 30(b)(6) witness and legal conclusions and things
24 like that.

25 The meet-and-confer process doesn't run out until

1 Saturday. So we were going to file a motion Saturday. But
2 if it's easier for the plaintiffs in terms of responding,
3 easier for the Court to understand, we can probably file it
4 today. We just don't want to trip over the schedule. We're
5 just mindful that he's someone who I think is coming up next
6 week in, in your case.

7 THE COURT: Well, I encourage you to file it as
8 soon as you can.

9 MR. SCHMIDT: Okay. That's what we'll do, Your
10 Honor. Thank you.

11 THE COURT: Anything else?

12 We have one motion set for argument. That's the
13 plaintiffs' motion concerning the IQVIA trial testimony.
14 And when I previously ruled on this motion, I left the door
15 open and the parties have walked through it and the motion
16 is back on the plate.

17 So, Mr. Majestro, do you want to proceed here?

18 MR. MAJESTRO: Yes, Your Honor. Thank you, Your
19 Honor.

20 May it please the Court, we think this is a pretty
21 simple motion. It's essentially a motion to allow trial
22 testimony -- a trial deposition for the purpose of laying an
23 evidentiary foundation.

24 Now as Your Honor is aware, the courts in this
25 district -- while the rule doesn't, doesn't differentiate

1 between evidentiary depositions and discovery depositions,
2 as a matter of practice, the courts in this district have
3 done so.

4 This morning I just looked on Westlaw real quick. And
5 although we didn't cite it in the brief, Judge Goodwin wrote
6 a really good opinion in 2020 in *Murray vs. Lilly*, 2020
7 Westlaw 625194.

8 In that opinion he said, "Even though the Federal Rules
9 of Civil Procedure provide no distinctions as between
10 discovery and trial depositions, courts have recognized as a
11 practical matter that, in fact, differences exist.
12 Discovery depositions are taken for the purpose of
13 discovering evidence while trial or evidentiary depositions
14 are taken for the primary purpose of preserving testimony
15 for trial. Several courts have allowed trial depositions
16 after discovery deadlines have passed."

17 That's been the practice in this district and in state
18 courts of West Virginia for as long as I've been practicing
19 law. When you've got a witness -- and what we're talking
20 about here is maybe five minutes of evidence to lay the
21 foundation that Your Honor allowed us to do in reserving
22 that right in denying the motion without, without prejudice.

23 We don't think that the defendants will, will be
24 prejudiced by this. First of all, we're happy to take the
25 deposition remotely, as we've taken the majority of the

1 depositions in this case during COVID. We're quite good at
2 that. No one has to travel anywhere. We'll have -- provide
3 the witness with the appropriate Zoom log-in. His counsel
4 can do that. And it will not be a matter that will
5 prejudice anybody.

6 As I said before, it's likely to be short. If they're
7 willing to cooperate with us, we'll cooperate with them on
8 the time for it.

9 But finally and most importantly on the issue of
10 prejudice --

11 THE COURT: Are you saying the 100-mile rule
12 doesn't apply? I don't understand how you're going to get
13 around the fact that this person lives wherever he lives.

14 MR. MAJESTRO: They're in North Carolina. There's
15 two ways for that.

16 The first way, and I think the easiest way, we are
17 crossing-noticing this deposition with three other MDL cases
18 which have on-going discovery. And, so, we're going to have
19 the subpoena -- we've had the subpoenas issued out of the
20 court in North Carolina.

21 Can you pull up Exhibit 3 for me? Let me just show
22 Your Honor.

23 So, you know, this is the, the *Cherokee Nation* case.
24 It's one of the cases that was pending before Judge Polster.
25 This is --

1 THE COURT: Let me interrupt a second. So you
2 have a deposition subpoena pending --

3 MR. MAJESTRO: Yes.

4 THE COURT: -- in another case --

5 MR. MAJESTRO: Yes, sir, to which the defendants
6 are parties to.

7 THE COURT: Well, my memory is sometimes
8 inaccurate, but I recall the way to get around your problem
9 here was to file a miscellaneous proceeding in the other
10 court and go through that court, which you obviously don't
11 have time to do that.

12 Does the fact that this subpoena has been served in the
13 other case, does that get you around that problem?

14 MR. MAJESTRO: Yes, Your Honor, because the
15 witness is going to be compelled to show up. The
16 defendants, who are the defendants in that case, are going
17 to be compelled to show up to defend it.

18 THE COURT: And when is that going to happen?

19 MR. MAJESTRO: Well, we had actually had it set
20 for yesterday. The, the witness's lawyers raised some
21 objections and we're in a meet-and-confer on that. But I'm
22 fairly confident we can get it done before we rest our case.

23 And, you know, the other, the other issue is, you know,
24 under Rule 43 we could issue subpoenas in this case. If
25 you, if you go back to the Advisory Committee notes that

1 were, where Congress specifically said that the reason we're
2 amending this is to allow this precise situation to happen
3 where you have a remote witness, where you then issue the
4 subpoena from the issuing court where the remote witness is
5 under Rule 45. And the notes specifically allow that.

6 But, you know, it's our understanding -- we understand
7 your practice. You don't want to have live remote
8 testimony. We're okay with that.

9 The easiest thing to do is let us go do these
10 depositions and we'll get the testimony -- you know, you're
11 going to read it in five minutes. That will provide the
12 underlying, the underlying foundation.

13 And I, I think finally I just want to say that I think
14 we have established good cause to do this. From the very
15 beginning of this case, we have noticed our intent to, to
16 try to get this evidence in, this evidence into the record
17 in this trial.

18 And the, you know, in all the other cases where this
19 issue comes up -- and, for example, in -- there's a trial
20 going on right now in State Court in California in Orange
21 County. The parties have stipulated to the admissibility.

22 There's a trial going on -- not a trial, but there's
23 on-going discovery going on in the *City of Chicago* case
24 which is one of the first opioid cases to be filed. The
25 defendants there stipulated to the admissibility of this

1 evidence.

2 We don't understand why the defendants have a beef with
3 this. They're entitled to make those objections and require
4 us to, to prove the admissibility of the evidence. But in
5 the end, we want the right to do that.

6 The ability to just take this deposition we believe
7 will solve that problem. And then, Your Honor, we'll have
8 laid forth a record of the foundation and Your Honor can
9 make the final ruling as to whether or not it's admissible
10 or not.

11 THE COURT: Specifically, what do you expect to
12 get from this deposition that will later be admissible into
13 evidence?

14 MR. MAJESTRO: I think we're going to get the
15 evidence as to how the IQVIA data was gathered from all of
16 the pharmacies in terms of the reliability, and maybe
17 additional evidence in terms of the defendants' access to
18 that.

19 We have some evidence that -- in the documents we found
20 recently that Cardinal may have had access to it. But
21 that's a question of the ultimate admissibility.

22 What we would like, with permission to do, is to take
23 the short deposition so we can put the full record of the
24 foundation for the admission before Your Honor.

25 Thank you.

1 THE COURT: Taking the deposition in another case,
2 does that get you around the problem you have with the
3 discovery cutoff deadline?

4 MR. MAJESTRO: That deposition -- we have listed
5 IQVIA as a witness in this case and we would -- and however
6 the deposition gets taken, if it gets taken, we would be
7 submitting the deposition pursuant to the parties'
8 stipulation regarding designation of depositions.

9 THE COURT: Okay. Do you have anything further?

10 MR. MAJESTRO: Not unless you have any questions,
11 Your Honor.

12 THE COURT: All right.

13 Ms. Hardin, are you going to respond to this?

14 MS. HARDIN: Yes, sir.

15 Good morning, Your Honor. Ashley Hardin on behalf of
16 the defendants.

17 Your question, Your Honor, is: Are you saying the
18 100-mile rule doesn't apply to a trial subpoena? It
19 absolutely applies, and this Court has no authority to issue
20 a trial subpoena to IQVIA who resides in Durham, North
21 Carolina, which is not, obviously, within the State of West
22 Virginia and it is more than 100 miles from the courthouse.

23 Rule 35 has been amended to address the very argument
24 that the plaintiffs make, which is some notion that Rule 43
25 works an end run around Rule 45. It does not.

1 And the Advisory Committee notes actually say the
2 opposite of what Mr. Majestro just told you. They say they
3 are being -- that the rule is being amended to overrule the
4 Vioxx line of cases, which was a ruling from Judge Fallon in
5 the Vioxx litigation that allowed a defendant's CEO, I
6 believe was his title, to appear even though he was more
7 than 100 miles from the courthouse.

8 But even if that line of cases that the plaintiffs cite
9 had not been overruled by the amendments, which it has,
10 every single one of the cases that they cite has to do with
11 compelling a witness who is either a current or former
12 employee of the defendants in the case and, therefore, under
13 their control, or arguably under their control.

14 There is no case that the plaintiffs have cited that
15 gives this Court the authority to issue a trial subpoena to
16 a non-party, a third party who resides more than 100 miles
17 from the courthouse and outside of the state.

18 THE COURT: Well, what about what just came up,
19 and was a bit of a surprise to me, that there's going to be
20 a deposition taken of this person in another case? If that
21 happens, couldn't I be able to consider that?

22 MS. HARDIN: Well, I think it's unclear so far
23 whether that deposition is going to go forward or when it's
24 going to go forward. They certainly have issued a subpoena
25 in the *Cherokee Nation* case. But that gets to a level of

1 prejudice, Your Honor, to the defendants.

2 If the defendants -- I mean, excuse me -- if the
3 plaintiffs are able to co-opt another case that happens to
4 be pending in this country and that -- where discovery is
5 still open and we happen to be defendants, then the
6 plaintiffs are going to work an end run around this Court's
7 schedule. And they're going to be able to take discovery,
8 according to them, perhaps all the way up until the closing
9 arguments. That would be one-sided discovery. Plaintiffs
10 are not parties to any other case.

11 THE COURT: Well, I wouldn't allow that to happen
12 but I might allow this to happen. I'm -- this would be a
13 one-time thing and, and I don't -- I wouldn't permit them to
14 take depositions in other cases and bring them here in this
15 trial.

16 MS. HARDIN: Well, I'm glad to hear that, Your
17 Honor, that you wouldn't allow that. It's not clear to me
18 the plaintiffs won't try to do that because it seems like
19 quite a bit of a slippery slope.

20 But -- so you can't issue -- just to get back to
21 principles, Your Honor, you cannot issue the trial subpoena
22 and you do not have the authority to do so.

23 In order to reopen discovery in this case to allow them
24 to take what they are calling an evidentiary deposition
25 three days before the opening statements, they're going to

1 have to -- that extraordinary request has to be met with
2 good cause. They've not given you any cause whatsoever,
3 much less good cause.

4 The mere fact that they would like to get this evidence
5 in at trial is not good cause. They have to have shown
6 diligence for taking the discovery during the discovery
7 period. And they've not told you that they did one single
8 thing to accomplish that because they didn't.

9 They didn't try to take the deposition of IQVIA. And
10 if it was only going to be five minutes and if it was going
11 to be something so crucial to their case, there's no reason
12 why they didn't take it. Their expert relied on it. They
13 knew they wanted to get this into evidence and they didn't
14 even try.

15 The linchpin for assessing good cause under Rule 16 is
16 their diligence. They haven't shown any diligence. The
17 mere fact that they filed a motion for its admissibility is
18 not the diligence we care about. But even so, defendants
19 opposed that motion. They knew what the bases are.

20 And the suggestion that it's unreasonable that the
21 defendants have not stipulated to this data is a bit absurd,
22 Your Honor. You have ruled that it is inadmissible. You
23 have agreed with us that it is hearsay and it is irrelevant
24 because the defendants did not purchase it.

25 So the deposition of IQVIA is not going to fix that.

1 They're not going to testify that we had the data because we
2 didn't. And insofar as the hearsay exception, we know what
3 they're going to say about that because they submitted a
4 letter that says exactly what this data is and what it
5 isn't.

6 It is not established factual information such as the
7 type that the Fourth Circuit says can be admissible under
8 the hearsay exception. And Your Honor quoted from that
9 letter from IQVIA in Your Honor's order. IQVIA has stated
10 that they will testify according to that letter.

11 So they haven't shown good cause because they, they
12 failed to exercise any diligence whatsoever. They haven't
13 shown good cause -- we shouldn't even -- we don't even have
14 to get past that. That's -- if you haven't shown diligence,
15 you're out under the case law.

16 But even getting to the other factors, they can't show
17 that this deposition is going to help them because it can't
18 override the factors that Your Honor has said are the bases
19 for your opinion excluding it.

20 And you can't issue the trial subpoena and they can't
21 work an end run around This Honor's schedule by trying to
22 co-opt discovery in other cases. That would be an abuse of
23 the bellwether process and would allow them one-sided
24 discovery that the defendants are not entitled to.

25 So for those reasons, Your Honor, we ask that you deny

1 the plaintiffs' motion both to reopen discovery and to
2 permit a trial subpoena.

3 THE COURT: Thank you, Ms. Hardin.

4 Mr. Majestro, what's your good cause to take the late
5 deposition?

6 MR. MAJESTRO: The good cause is that -- that's
7 what trial depositions are. They're depositions when you're
8 going to present the evidence with -- for witnesses that you
9 can't get to trial. And, and Judge Goodwin has explained
10 that that is the practice here.

11 The second good cause is I think it's good cause that
12 it's reasonable to -- for us to assume that the defendants
13 were going to do what every -- what other defendants in all
14 of these cases were going to do and, you know, go back to
15 the original briefing. Their own experts talk about the
16 reliability of this data. It's not really in dispute.
17 They're, they're just trying to make it difficult on us.

18 And, so, it was reasonable for us to rely on the fact
19 that they would act reasonably. We, we -- if we have to
20 take depositions of documents and other evidence that is not
21 seriously in dispute, we would, we would never be able to
22 get this case to trial. And all we're asking for is this
23 one very short deposition.

24 Her argument that the rules don't allow the subpoena to
25 issue from this Court, none of the subpoena issues from

1 North Carolina -- under the rules, it's like a miscellaneous
2 action. You don't have to formally open it up. But you
3 can, you can issue the subpoena from, from North Carolina
4 just like the Court in the *Cherokee* case did.

5 And under Rule 43 you could actually -- we could
6 actually have remote video of this witness. And I'll read
7 you the Advisory Committee notes. It couldn't be clearer.

8 "When the issuing Court has made an order for remote
9 testimony under Rule 43(a), a subpoena may be used to
10 command a distant witness to attend and testify within the
11 geographical limit of Rule 45(c)."

12 That is, that is expressly -- an express quote from the
13 Advisory Committee. It makes sense. It would not make any
14 sense to have, have this process where you're going to have
15 remote testimony without the ability to compel the witnesses
16 to show up.

17 Finally, Your Honor, this whole issue about the
18 subpoena is if IQVIA was going to voluntarily show up, we
19 could -- there's no question we could have them testify in
20 court here. We could have them sit for a deposition.

21 The issue about whether or not the subpoena is valid is
22 IQVIA's issue. It's not -- the defendants don't have
23 standing to complain about that. They aren't here filing
24 motions to quash a subpoena based on the grounds that
25 there's no authority to have them issue.

1 And, finally, since this is a remote deposition, we'll
2 get the witness to show up. You issue a subpoena; the
3 Cherokee case issued a subpoena; the witness shows up;
4 witness shows up; we do the deposition.

5 Instead of arguing academically about, about what the
6 Advisory Committee says on Rule 43, we think you ought to
7 let us have this deposition, consider it in evidence. And
8 we're not -- the slippery slope she's worried about we can
9 deal with if we step off a cliff and go down that.
10 Plaintiffs are not intending to do that. This is not an end
11 run. It's a trial deposition.

12 THE COURT: Is there anything that might happen at
13 trial to get around your problems like through another
14 witness or something like that that would make it
15 admissible?

16 MR. MAJESTRO: We don't think so.

17 MR. FARRELL: Maybe.

18 MR. MAJESTRO: Well, maybe. My co-counsel pops
19 up. There's -- I mean, not that we know of. And because
20 Your Honor has required us in the order to lay the
21 foundation, we'd like to have a witness that does that. And
22 the witness -- the best witness to do that is the 30(b)(6)
23 representative of IQVIA. I mean, we've already spent more
24 time arguing about this than it would take to take the
25 deposition.

1 THE COURT: Okay. Well, I'll rule on this before
2 the sun goes down.

3 MR. MAJESTRO: Thank you, Your Honor.

4 THE COURT: Is there anything else we need to
5 discuss today? That exhausts my list.

6 Yes, sir.

7 MR. SCHMIDT: Yes, Your Honor.

8 In the category of just flagging a possible issue for
9 Your Honor, this is something we've been discussing with the
10 plaintiffs.

11 It's our understanding that at trial they intend to
12 have a screen -- a machine that will have various data in it
13 on distribution much like those election night screens you
14 can touch and manipulate the data and everything. And I
15 guess they've had this for half a year now. They let us see
16 it yesterday, but we haven't been able to actually
17 understand everything it contains.

18 And, so, we do have concerns about their use of
19 underlying data in that data set that we haven't been able
20 to test. My understanding is we do have some 1006 evidence
21 that we got from you last night that we're looking at in
22 terms of potential objections.

23 So we'll, we'll continue to confer with the plaintiffs
24 on that. But we just want to flag that for the Court as an
25 issue that might come up early next week if we can't work it

1 out.

2 THE COURT: If it comes up, we'll deal with it.

3 MR. SCHMIDT: Thank you, Your Honor.

4 MS. FLAHIVE WU: Your Honor, Laura Wu from
5 McKesson.

6 We also wanted to raise a trial management issue about
7 deposition designations. So far, the plaintiffs have
8 identified roughly 25 hours of deposition designations. We
9 understand there are many more hours to come. And we wanted
10 to check with you about your preferences and the procedures
11 for dealing with deposition designations during this trial.

12 First, we wanted to confirm that you would view those
13 deposition designations all at one time consistent with an
14 order Judge Polster issued in the MDL in chronological
15 order.

16 And, in addition, given the large scale of the
17 designations that we've seen thus far from plaintiffs, we
18 wanted to confirm that the designations would count against
19 a designating party's trial time in a rough sense so that a
20 party doesn't have a chance to sludge large amounts of
21 evidence into the record.

22 We wanted to check with you also as to whether you want
23 to view designations during court time or whether you prefer
24 to do that in chambers.

25 (Pause)

1 THE COURT: On advice of counsel, I'll answer your
2 question.

3 MS. FLAHIVE WU: Thank you, Your Honor.

4 THE COURT: We prefer to watch them in chambers.
5 It makes it much easier for us if we have a written
6 transcript at the same time with the objections in it and
7 then we can annotate the transcript with our rulings and
8 give it back to you. We followed that procedure in the
9 notorious pig case in North Carolina. It was time
10 consuming, but it, it works that way. So that's our -- my
11 preferred procedure if that's all right with everybody.

12 MS. FLAHIVE WU: Yes, Your Honor. And we'll
13 provide you with the videos in chronological order so they
14 follow the order of the depositions so they make sense
15 contextually.

16 THE COURT: Okay. Now, how is this going to
17 impact the trial time that I've allotted?

18 MS. FLAHIVE WU: Well, Your Honor, that is an
19 issue that we, the defendants, are concerned about. The
20 defendants have already received nearly 25 hours of
21 deposition designations from the plaintiffs. We've also
22 been advised that they plan to designate significantly more
23 deposition designations.

24 We believe that this is an attempt by the plaintiffs to
25 scale up their presentation in this case, and we believe

1 that's inappropriate.

2 For that reason, we ask Your Honor to give guidance as
3 to the way that the time of deposition designations would
4 count against the designating party's trial time in this
5 case to avoid that type --

6 THE COURT: Well, I'll have to think about that.
7 The easy answer is that it, that it counts against your
8 time, period.

9 MS. FLAHIVE WU: We agree, Your Honor. And we,
10 the defendants, will live by that same rule of course.

11 THE COURT: Well, let me hear from the other side
12 about this.

13 Mr. Farrell.

14 MR. FARRELL: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. FARRELL: There's three issues that were
17 raised.

18 The first is the viewing the depositions in chambers.
19 And that was our understanding as well. And I believe that
20 our teams are figuring out how to get them in the record,
21 but that's the idea.

22 But the second issue was we agree it should count
23 against trial time. If, if we designate 20 minutes and the
24 defendants designate two hours, or vice versa, if the
25 defendants designate 20 minutes and we designate two hours,

1 it should count against you.

2 As the Court probably knows, I've tried several of the
3 bellwether cases in the transvaginal mesh and that was the
4 general rule. And -- but that gets to point number one that
5 I think that counsel was alluding to. And I think there is
6 a dispute about the sequencing of it.

7 In the *Boston Scientific* case in front of Judge Berger,
8 the way it worked when we had a jury, of course, is that we
9 would stand up and we would say, "Judge, we intend to
10 present the testimony of Bob Jones and the plaintiffs are
11 going to play for you five minutes." And then we would play
12 five minutes of like a direct witness.

13 Then the defendants would get up and they would say for
14 the cross-examination, "We're going to play 10 minutes."
15 And then they would play their 10 minutes.

16 For some of these depositions it's not going to make a
17 difference. So there's only two designations that are
18 really teed up right now.

19 We anticipate in the first week of trial after opening
20 that we will call Dr. Corey Waller as our first witness on
21 Tuesday. Depending on when he gets done, we intend to call
22 a historian, Dr. Courtwright, to provide a little context
23 followed by Dr. Gupta and Jan Rader.

24 We would like to introduce into the record two
25 deposition transcripts. One is a 30(b)(6) of Nate Hartle

1 that my colleague has mentioned we need expedited rulings on
2 the designations. And the second is the testimony of the
3 DEA's 30(b)(6), Thomas Prevoznik.

4 So question number one is: Do you plan on watching
5 deposition videos on weekdays or would you prefer that we
6 give you the designations on Friday for you to enjoy
7 watching over the weekend?

8 THE COURT: It's college baseball season, Mr.
9 Farrell.

10 (Laughter)

11 MR. FARRELL: So our intentions, we thought, were
12 that you probably will have heard enough of us on weekdays.
13 And, so, what we anticipated is on Fridays we would present
14 to the Court before closing proceedings a couple of the
15 video deposition designations that we intend to actually
16 submit in the record. That's our intention.

17 Now, to address the voluminous hours of deposition
18 designations we've given so far, I'm hoping you're not
19 exasperated initially. But what -- the purpose of it is
20 this: We intend to follow the rules of evidence.

21 So if we're required to call a sponsoring witness, if
22 we're required to take a document to say, "What is it? Do
23 you recognize it? What's the date? Do you see the Bates
24 stamp number? Is that your name?" If we're required to lay
25 basic foundations, we'll do so for every exhibit in this

1 case because as Your Honor is aware, we have spent three
2 years in discovery in between the time we started and we
3 came back. My colleagues and our side, we get along fairly
4 well because there isn't a fight we haven't already had.

5 So we are going to designate dozens and dozens of
6 10-minute designations and then see how the rulings go. And
7 if we are able to, to follow the rules of evidence, we have
8 some stipulations in place, we don't anticipate we're going
9 to be submitting them all. But we're prepared to if we need
10 to lay the proper foundation.

11 Secondly, and finally, this is, this is the, the main
12 beef.

13 Thomas Prevoznik, the DEA's 30(b)(6) designee, was
14 deposed over a series of three days. There were cross
15 notices, cross *Touhys*, and lots of fights to get DEA in the
16 seat and a whole panel of DOJ lawyers.

17 The argument was who got to go first. And, so, we got
18 into an argument of whose subpoena got served first because
19 I wanted to go first because I knew we would be calling the
20 DEA 30(b)(6) in our case-in-chief and I would like the
21 question, "Please state your name," to come from me instead
22 of from the defendants.

23 So regardless when you look at the three days, when we
24 say, "What is your name," it's the afternoon of day two.

25 What I would like to do is I would like to designate --

1 I think our number is somewhere -- let's just say it's an
2 hour. If I designate an hour on the afternoon of day two, I
3 want you to see it first because that's our case-in-chief
4 and it's what I want you to hear.

5 The defendants have designated, and rightfully so,
6 cross designated questions and answers from day one. So
7 they want you to listen to an hour of day one of them asking
8 questions first when it's my case-in-chief.

9 Now, the only caveat to all of this is if I ask
10 question one and then I ask question three and I leave out
11 question two, the defendants have the right under the rule
12 of completeness to say, "Hey, you've got to put two back in
13 there because it doesn't make sense to pull it out and stick
14 it."

15 And this is exactly how we tried the case in front of
16 Judge Berger. It's how we tried the case in front of Judge
17 Goodwin.

18 So while I appreciate the desire and the wish that the
19 defendants can call witnesses in our case-in-chief, we would
20 like to be the ones to have our voices asking the questions
21 first.

22 MS. FLAHEVE WU: Your Honor, if I may.

23 Mr. Farrell is correct. The parties have dealt with
24 many of these issues in the past. In fact, in the MDL Track
25 One with Judge Polster, we had the exact same debate.

1 And Judge Polster entered an order -- it's MDL Docket
2 Number 2594 -- in which he required the parties to designate
3 deposition testimony so that all testimony for a witness
4 would be presented at one time following the natural order
5 of the evidence.

6 We understand that there may be particular witnesses in
7 which Mr. Farrell has an interest to go out of order.
8 However, that makes no sense because the depositions need to
9 be viewed question by question in the context of the
10 deposition. That allows for the orderly and logical
11 admission of evidence in this case.

12 And we believe there needs to be one rule consistent
13 with Judge Polster's order in the MDL which applies to all
14 witnesses in this case.

15 THE COURT: So his rule was to consider the
16 witness once?

17 MS. FLAHIVE WU: Exactly, Your Honor.

18 THE COURT: And each side gets to designate what
19 parts of the --

20 MS. FLAHIVE WU: Exactly. Each deponent calls --
21 each deposition designation would be all inclusive. So all
22 parties' designations would be put in at one time so they
23 could be viewed in an orderly way as they were presented
24 during the depositions, Your Honor.

25 THE COURT: Mr. Farrell, do you have any problem

1 with that?

2 MR. FARRELL: With all due respect, that's not my
3 recollection of Case Track One of Judge Polster's order
4 regarding the order of play. I can certainly go back and
5 take a look at it.

6 I will note, a little bit of tongue-in-cheek, that the
7 defendants appear to selectively be choosing which orders
8 they would like you to enforce from Judge Polster.

9 MS. FLAHIVE WU: Your Honor, I have a copy of the
10 order if it would be convenient to provide it.

11 MR. SCHMIDT: Your Honor, may we just go off the
12 record for one moment?

13 THE COURT: Yes.

14 (Off-the-record discussion after which the following
15 occurred:)

16 THE COURT: Judge Polster's trial was a jury
17 trial, wasn't it?

18 MR. FARRELL: Yes, Your Honor.

19 THE COURT: Well, I think we have a little
20 different situation here since the parties have consented to
21 a bench trial. And I think the thing to do would be to let
22 you put your parts in first, Mr. Farrell, and then have the
23 other side come back and do theirs. We don't have the
24 problem with confusing the jury that we would have in a jury
25 trial.

1 And as far as, as far as my review of the depositions
2 and the objections and everything, just give them to us as
3 far ahead of time as you can and we'll take the time to get
4 them done. That might be a way to fill up the Friday
5 afternoons that I thought we were going to take off.

6 MR. FARRELL: Judge, I think what we're working
7 out is that we'll have a spreadsheet that line items the
8 objections. But then we'll have a color-coded transcript
9 that will show the designations from one party, the
10 designations from another party, and then highlight
11 separately where the objections are.

12 THE COURT: Well, that would be, that would be
13 very helpful and eliminate some of the danger that I might
14 get confused.

15 Okay. Do we have anything else we need to take up this
16 morning?

17 MS. MAINIGI: Your Honor, just with respect to
18 openings, I assume Your Honor generally wants us around the
19 podium for doing the openings.

20 THE COURT: Well, yeah. The -- if you speak at
21 the podium and speak directly into the microphone, that will
22 help me to understand you. I don't have a big problem with
23 the lawyers moving around the courtroom. In a jury trial we
24 try to put the lid on that. But anything within reason that
25 you need to do to be comfortable --

1 MS. MAINIGI: Thank you, Your Honor.

2 THE COURT: -- is okay with me.

3 MS. MAINIGI: Thank you, Your Honor.

4 THE COURT: But the most helpful thing to me would
5 be to have you at the podium speaking directly into the
6 microphone.

7 MS. KEARSE: Your Honor, is there any chance if we
8 have lapel mics if we saw we were going to be using the
9 screen and we had a lapel mic that would hook up?

10 THE COURT: Oh, you want to walk over and point to
11 the screen?

12 MS. KEARSE: Yeah, if someone --

13 THE COURT: Oh, no, that's fine.

14 MS. KEARSE: So we could have a lapel mic so we're
15 always mic-ed up on that as well.

16 THE COURT: No, that's fine.

17 MS. KEARSE: Thank you, Your Honor.

18 THE COURT: Okay. Going once. All right, if
19 there's nothing further, I'll see you at 9:30 Monday morning
20 and we'll proceed with the openings.

21 I'm going to ask counsel to be here at 9:00 so if any
22 problems come up, we can deal with them without cutting into
23 the time we've already set aside for the opening statements.
24 Okay?

25 I'll see everybody on Monday.

(Proceedings concluded at 11:49 a.m.)

* * * * *

I, Lisa A. Cook, Official Reporter of the United States District Court for the Southern District of West Virginia, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter.

s\Lisa A. Cook

April 30, 2021

Reporter

Date